

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE WALTER BOSWELL,

Defendant-Appellant.

UNPUBLISHED

July 23, 2013

No. 307342

Wayne Circuit Court

LC No. 11-005601-FC

Before: STEPHENS, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of first-degree felony murder (murder in the perpetration of larceny from a person), MCL 750.316(1)(b), for which he was sentenced to life without parole. We affirm.

In relevant part, this case involves the murder of, and larceny from, Michael Yost, who lived on Muirland in Detroit with his girlfriend, Kimberly Burrell. On the night of June 13, 2009, Yost, carrying at least \$200 cash in his wallet and wearing an \$800 silver watch encrusted with diamonds, left the home he shared with Burrell to walk to a Marathon gas station near his home. On the way to the gas station, Yost came into contact with defendant and a man who defendant referred to as Dirt, but who police learned went by the name “Mudd.”¹ Defendant and Dirt were the last two people seen with Yost before he was shot in the back of the head and his wallet and watch were stolen.

On appeal, defendant first contends that his conviction was not supported by sufficient evidence. When reviewing a claim of sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). This Court “must determine whether any rational trier of fact could have found that the essential elements of the crime were proven as required.” *Id.* “The evidence is sufficient to convict a defendant when a rational factfinder could determine that the prosecution proved every element of the crimes charged beyond a reasonable doubt.” *People v*

¹ This opinion will refer to him throughout as Dirt.

Cain, 238 Mich App 95, 117; 605 NW2d 28 (1999). Bench trials are reviewed under the same standard. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

The elements of first-degree felony murder are:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result [i.e., malice], (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b), here larceny]. [*People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007) (quotation marks and citations omitted; alterations in *Smith*).]

Regarding the “malice” element:

[t]he facts and circumstances of the killing may give rise to an inference of malice. A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon. [*People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999).]

Furthermore, a defendant can be found guilty of first-degree felony murder on an aiding and abetting theory. *Id.* at 755. To do so, the prosecution must prove that defendant (1) performed acts or gave encouragement that assisted the commission of the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a high risk of death or great bodily harm with knowledge that death or great bodily harm will probably result, (3) while committing, attempting to commit, or assisting in the commission of the predicate felony. *Id.* at 757-761; see also *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980). Furthermore, if an aider and abettor participates in a crime with knowledge of the principal’s intent to kill or to cause great bodily harm, the aider and abettor is acting with “wanton and willful disregard” sufficient to support a finding of malice. *Aaron*, 409 Mich at 733.

MCL 750.316(1)(b) specifically provides that larceny is one of the enumerated felonies in a first-degree felony murder charge. The elements of larceny from a person are:

(1) the taking of someone else’s property without consent, (2) movement of the property, (3) with the intent to steal or permanently deprive the owner of the property, and (4) the property was taken from the person or from the person’s immediate area of control or immediate presence. [*People v Perkins*, 262 Mich App 267, 271-272; 686 NW2d 237 (2004).]

Felony murder does not occur if the intent to steal from the victim is not formed until after the homicide. *People v Brannon*, 194 Mich App 121, 125; 486 NW2d 83 (1992). “[T]o qualify as felony murder, the homicide must be incident to the felony and associated with it as one of its hazards.” *People v Thew*, 201 Mich App 78, 87; 506 NW2d 547 (1993). However, “[i]t is not necessary that the murder be contemporaneous with the enumerated felony. The [felony murder] statute requires only that the defendant intended to commit the underlying felony at the time the homicide occurred.” *People v Kelly*, 231 Mich App 627, 643; 588 NW2d 480 (1998).

In this case, the trial court did not specifically rule whether defendant was guilty of first-degree felony murder as an aider and abettor or as the principal. However, it did state that “[t]here’s no question on this record that . . . you were working in tandem with Dirt” The trial court also found that defendant and “Dirt had a plan ahead of time. There’s no question about it. You’re going to set this guy up, and you set him up. You set him up.” Either way, sufficient evidence existed to prove defendant acted either as the principal in the murder of Yost or as an aider and abettor with Dirt.

The first element of first-degree felony murder requires a showing that a human being was killed. *Smith*, 478 Mich at 318. Additionally, identity is always an “essential element” of any crime, which must be proven beyond a reasonable doubt. *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976). Thus, the prosecution was required to show either that defendant did the killing himself, or that he performed acts or gave encouragement that assisted the commission of the killing of a human being. Here, there is no question that Yost was killed from a gunshot wound to the head because the parties stipulated to this fact. Defendant argues that it cannot be proven that he shot the gun that killed Yost. However, it does not matter if defendant fired the gun because sufficient evidence existed showing that he, at a minimum, aided Dirt in the killing of Yost. Second, at the time that Yost was shot in the head, both defendant and Dirt were standing in close proximity to Yost. In fact, by his own admission, defendant placed himself and Dirt at the scene of Yost’s murder, explaining that he, Dirt, and Yost were walking down Muirland when defendant heard a “loud boom” and he saw Yost’s white hat fall to the ground. Defendant contends that it is unclear who shot Yost; in fact, defendant argues that Yost was probably shot by a gunman who was hiding some distance from the men. However, defendant told Detroit Police that he saw Dirt holding a gun after he heard the loud boom and witnessed Yost fall to the ground.

Further evidence also linked defendant to Yost’s murder. Shanise Tipton and Deante Simmons both witnessed Yost’s murder. Tipton witnessed a group of three men who matched the descriptions of Yost, Dirt, and defendant. Tipton saw them walking and then they stopped and started talking. At some point, Tipton heard a gunshot come from the direction of the three men. Tipton testified that she did not see anything that would lead her to believe either man had a gun. After the gun was fired, Tipton witnessed Yost fall to the ground, while men matching the descriptions of Dirt and defendant stayed standing near the body. Next, Tipton witnessed the man who fit Dirt’s description walk toward the alley and stop while the man who matched defendant’s description went through Yost’s pocket and removed a large item.

Simmons also witnessed the incident. According to Simmons, after the shooting, one of the men served as a “look-out” while the other man rifled through Yost’s pockets. All of this evidence places defendant at the scene of the murder at the precise time of the murder. Because defendant searched through Yost’s pocket after Yost was shot, it was reasonable for the judge to infer that one of the men, either defendant or Dirt, committed the killing. Even if defendant did not commit the killing, there is evidence that defendant performed acts or gave encouragement that assisted Dirt in the commission of the killing. In fact, if defendant truly had nothing to do with Yost’s murder, it is unlikely that an eyewitness would see a man who matched defendant’s description pull something out of Yost’s pocket while Yost was lying on the ground with a gunshot wound to the head. Additionally, the position of the man who matched the description of Dirt serving as a look-out while defendant looked through Yost’s pockets serves as evidence

that the two men were acting together when Yost was killed. Thus, viewing the evidence in the light most favorable to the prosecution, sufficient evidence existed to conclude that defendant killed or aided in the killing of Yost.

Second, the prosecution presented sufficient evidence that defendant participated in the murder of Yost and that he had the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result. This element, commonly referred to as “malice,” can be inferred from the facts and circumstances surrounding the killing. In fact, a trier of fact may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. Malice may also be inferred from the use of a deadly weapon. *Carines*, 460 Mich at 759. Although no gun was ever recovered, it is clear that Yost was killed by a gunshot wound to the head. Because defendant or Dirt used a deadly weapon to kill Yost, malice can be inferred.

Lastly, the prosecution was required to prove that Yost was killed while defendant was committing, attempting to commit, or assisting in the commission of a larceny. Sufficient evidence was proffered that supported a finding that either defendant committed the larceny or he assisted Dirt in the commission of the larceny. To prove larceny, it must first be shown that Yost’s property was taken from him without his consent. *Perkins*, 262 Mich App at 271-272. Burrell testified that Yost should have had roughly \$250 in cash in his wallet and that Yost was wearing a diamond encrusted watch. Defendant told police that both items were taken from Yost by Dirt. It is interesting that defendant had an opportunity to witness precisely what was taken from Yost’s person because defendant told police that as soon as he heard the gunshot he took off running and that only when he turned around while running did he witness Dirt rob Yost. However, Tipton saw a man who matched defendant’s description removing an item from Yost’s pocket. Additionally, neither the wallet nor the watch was ever recovered. Viewing these facts in the light most favorable to the prosecution, defendant removed something that belonged to Yost from Yost’s person and took it without Yost’s permission because Yost was dead.

Additionally, sufficient evidence supports a finding that the property was moved; in fact, Tipton witnessed the man who matched defendant’s description move further down the alley and catch up with the man who matched Dirt’s description. Thus, viewing the evidence in the light most favorable to the prosecution, the property was moved. Next, sufficient evidence supported a finding that defendant took the property with the intent to permanently deprive Yost of his belongings. In fact, he killed Yost to get the property. Thus, sufficient evidence supports a finding that he had the intent to permanently deprive Yost of his property. Finally, sufficient evidence supported a finding that defendant took the property from Yost’s immediate area of control or immediate presence. In fact, Tipton witnessed him remove it from Yost’s front right pocket. Thus, sufficient evidence supported a finding that defendant committed the predicate felony of larceny.

Finally, the prosecution was required to show that defendant had the intent to commit the larceny at the time of the homicide. *Kelly*, 231 Mich App at 643. According to defendant, himself, he walked to the Marathon gas station to “get some blunts.” Defendant said that he was accompanied by Dirt. Defendant said that on his way to the gas station, he and Dirt “came across” Yost. The video surveillance footage from the Marathon gas station shows that the first man to walk into the gas station was Yost. Then, eventually, both Dirt and defendant entered the

Marathon station, and the two, standing only five to five and a half feet away from Yost, appeared to have a conversation. This conversation appears to have taken place for at least 15 seconds. At one point, both Dirt and defendant exited the Marathon station. This left Yost in the station by himself. However, defendant and Dirt returned and, eventually, all three men, including Yost, left the Marathon station. Viewing the evidence in the light most favorable to the prosecution, this evidence shows that (1) defendant and Dirt had an opportunity to see Yost's watch and possibly his wallet and (2) defendant and Dirt had time to formulate a plan to kill Yost to get his watch and whatever else he may have carried on his person. In fact, after Yost was shot, instead of trying to get Yost medical help, calling the police, or getting assistance from someone in the neighborhood, both Dirt and defendant stayed near the body; Dirt served as a look-out, and defendant went through Yost's pocket. The relationship in time between the murder and the larceny, when viewed in the light most favorable to the prosecution, provides sufficient evidence that defendant had the intent to commit larceny before or at the time he killed or assisted in the killing of Yost. Thus, a rational trier of fact could have found that the essential elements of first-degree felony murder were proven beyond a reasonable doubt.

Defendant next argues that his guilty verdict was against the great weight of the evidence. When reviewing the question whether a verdict was against the great weight of the evidence, this Court must review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). A court's ruling is against the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon*, 456 Mich at 627; *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). "Absent exceptional circumstances, issues of witness credibility are for the trier of fact." *Unger*, 278 Mich App at 232. Exceptional circumstances include situations where "a witness's testimony is . . . so inherently implausible that it could not be believed by a reasonable juror" or "where the witness['] testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Lemmon*, 456 Mich at 644 (quotation marks omitted). "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647. Furthermore, in a bench trial, "[f]indings of fact by the trial court may not be set aside unless clearly erroneous." MCR 2.613(C).

The trial court's ruling was not against the great weight of the evidence because the evidence did not preponderate heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand. *Lemmon*, 456 Mich at 627. In fact, for the same reasons we discussed regarding sufficiency of the evidence, the great weight of the evidence—from defendant's own statements, video surveillance footage at the Marathon gas station, eyewitness testimony, and the timing of the larceny in relation to the murder—supported a finding that defendant was guilty of first-degree felony murder.

Lastly, defendant claims that he was denied effective assistance of counsel. Because defendant took no steps to move for a new trial, or seek to make a separate factual record supporting his claims, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A

judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* "This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations. This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

"There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Id.* To establish a claim of ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Furthermore, "[w]hether defense counsel's performance was deficient is measured against an objective standard of reasonableness." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Thus, to prevail, "defendant must show that counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 US at 688, and that he was prejudiced by counsel's performance, which can be shown by proving "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. This Court "will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *Unger*, 278 Mich App at 242-243. Defendant "bears the burden of demonstrating both deficient performance and prejudice[:]; the defendant [also] necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

On appeal, defendant claims that defense counsel's failure to investigate leads involving an alleged confession to Yost's murder denied him the effective assistance of counsel required by the United States Constitution. At the preliminary hearing, Officer Scott Shea testified that "a young lady who came forward, I believe who was locked up at a precinct that said she believes her boyfriend did it, was the gentleman that shot Michael Yost." Shea said that he looked into the lead, and his investigation "did not lead to anything at all." Defendant contends that if his trial counsel had followed up on this lead, this would have created reasonable doubt regarding whether defendant committed the murder or was involved in the murder.

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. [*Strickland*, 466 US at 690-691.]

In order to constitute ineffective assistance, counsel's failure to investigate must result in prejudice to the defendant. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

The question then becomes whether a reasonable probability exists that, if defense counsel had investigated, the outcome of the trial would have been different. *Strickland*, 466 US at 688.

In this case, the record² does not support defendant's claim that trial counsel acted unreasonably. The witness statement on which defendant relies was later changed by the same witness more than nine months before trial. Thus, even if defense counsel had investigated the lead or called this witness, either the witness would have testified consistent with her more recent statement, which would not help defendant's case, or she would have testified consistent with the first statement and been impeached by the subsequent statement. Thus, defense counsel's alleged failure to investigate or call the witness appears to be a clear exercise of trial strategy. Moreover, even if defense counsel's failure constituted insufficient assistance, defendant could not prove that he was prejudiced. Overwhelming evidence, including defendant's own statements to Shea and phone calls defendant made shortly after the murder of Yost, place defendant directly beside Yost when he was murdered. Furthermore, defendant told Shea that he saw Dirt holding a gun after Yost was shot. It is entirely possible that defense counsel strategically did not investigate this issue or raise it at trial because it would have further called into question defendant's credibility.

Second, defendant argues that trial counsel was ineffective because, had he visited the crime scene, he would have known that eyewitnesses Tipton and Simmons were not 50 feet away from the scene of the murder as they testified. In fact, defendant argues that defense counsel would have discovered that the witnesses were 150 feet from the scene. Defendant contends that Trial Exhibit 5, which details the streets and addresses near and around where Yost was murdered, would have revealed to the trial court that Tipton and Simmons were more than 50 feet from the murder scene. First, defendant's assertion on appeal is incorrect because the map specifically says that it is not drawn to scale and it provides no measurements to determine how far apart the objects are. Second, there are no facts on the record to support that (1) defense counsel never actually visited the murder scene or that (2) Tipton and Simmons actually stood more than 50 feet away from the scene of the crime. As for defendant's assertion that the alley is covered in graffiti referring to "Hit Man Mike," there is no evidence in this record of graffiti at the scene of the crime referring to "Hit Man Mike." Additionally, it is unclear what defendant is trying to prove by even mentioning this fact. Thus, defendant has failed to overcome the presumption that defense counsel provided effective assistance of counsel.

Lastly, defendant contends that his attorney was ineffective because he visited him only twice before trial. To support this, defendant relies on his affidavit attached to his brief on

² To support his argument, defendant relies on police statements that were attached for the first time in this Court, and not at the lower court level. In response, the prosecution provided an additional police statement to refute defendant's claim that was also not in the lower court record. We are aware that this Court generally requires a party to seek permission expand the record on appeal and that neither party so requested. However, in order to fully adjudicate the issue of ineffective assistance of counsel, we exercise our discretion under MCR 7.216(A)(4) and consider these documents.

appeal. There is no evidence in this record to support defendant's contention. Thus, the presumption remains that counsel acted effectively.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Kurtis T. Wilder

/s/ Donald S. Owens